DEUTZ MWM FAR EAST PTE. LTD.

v.

THE OWNERS OF & OTHER PERSONS INTERESTED IN THE SHIP OR VESSEL "HULL NO. 308"; STANDARD CHARTERED BANK (INTERVENERS)

COURT OF APPEAL, SINGAPORE
YONG PUNG HOW CJ
LP THEAN J
CHAN SEK KEONG J
[CIVIL APPEAL NO. 105 OF 1987]
9 OCTOBER 1991

SHIPPING: *Application by plaintiffs for leave to serve writ in rem and order of arrest against defendant debtor - Leave not applied for at time writ issued - Application by defendant to set aside writ and arrest - Both applications heard by same Judge - Whether Judge was functus officio - Different applications - Whether writ was properly issued - Writ in rem issued after commencement of winding-up proceedings - Whether plaintiff secured creditor - Test in In Re Aro - Discretion of the Court - Fair and right in the circumstances - Companies Act [Sing], s. 262(3).*

Between September 1988 and December 1985 the plaintiffs supplied equipment and engines to the defendants for the construction of a ship or vessel called 'Hull 308'. On 3 December 1985, receivers and managers of the defendants were appointed as a result of an application by Standard Chartered Bank (SCB).

On 17 February 1986, a petition for the winding up of the defendants was presented by one of its creditors. On 18 February 1986, the receivers and managers were discharged and provisional liquidators were appointed by the Court pending the winding up of the defendants. On 18 April 1986 the plaintiff applied by way of summons-in-chambers for leave to serve the writ *in rem* on the vessel (plaintiffs' application) and one month later, the defendants took out an application to set aside the writ *in rem* (defendant's application).

On 19 May 1986, the plaintiffs obtained an order before Lai Kew Chai J giving leave to serve a writ of *rem* on Hull 308 and arrest her, which was done. SCB, thereafter successfully applied to intervene in the proceedings. Lai Kew Chai J then heard the defendants' application and granted an order setting aside the writ *in rem* and the arrest. Hence this appeal by the plaintiffs.

It was the plaintiffs' contention that:

(a) when the Judge exercised his discretion under s. 262(3) of the Companies Act (the Act) in granting leave to serve the writ *in rem* and the order of arrest on 19 May 1986 he was *functus officio* in relation to that order and ought not to have entertained the defendant's application to set aside the writ and

(b) there were no merits in the order of the learned Judge setting aside the writ *in rem*.

The defendants argued that as the main issue before the Judge in the plaintiff's application was whether Hull 308 was a vessel, the parties did not address the question whether in the circumstances leave should be given for the commencement of the action under s. 262(3) of the Act.

Therefore, it was contended that in granting the plaintiffs' application, the learned Judge had not been addressed on the question whether the writ *in rem* had been properly issued and if it was not, whether the plaintiffs were entitled to an order granting them leave to commence the action *nunc pro tune*.

Counsel for SCB, the interveners, adopted the arguments of Counsel for the defendants and submitted further that even if the defendants had successfully appealed against the order made by the learned Judge on the plaintiffs' application, an order given on such appeal would still not provide the remedy sought by the defendants in their application, in that the writ *in rem* against Hull 308 would still be in force and the ship would continue to be encumbered.

Held:

[1] The basic question is whether the hearing of the defendants' application amounted to a rehearing of the plaintiffs' application and whether the order under appeal was a variation of the earlier order. The plaintiffs' application was for leave to serve the writ on the vessel and to arrest her, while the basis of the defendants' application was that the writ was improperly issued and ought to be set aside. Both were entirely different applications and the defendants' application was in no way affected by the outcome of the plaintiffs' application.

[2] Even if the defendants had successfully appealed against the order made on the plaintiffs' application, the result sought by the defendants in their application would still be unattainable. Their application to set aside the writ *in rem* would still be required, and unless and until the writ is set aside, the ship would remain encumbered.

[3] Therefore, the hearing of the defendants' application did not amount to a rehearing of the plaintiffs' application and the order under appeal was not a variation of the order previously made on the plaintiffs' application.

[4] The plaintiffs could not assert prior to the winding-up any security on the vessel as they took out the writ *in rem* against 'Hull 308' after the commencement of the winding-up of the defendants. They had failed to satisfy the test laid down by Brightman LJ in *In Re Aro* that they were secured creditors. They could not therefore be considered as a secured creditor for the purpose of deciding whether or not the discretion under s. 262(3) of the Act should be exercised in their favour. Leave to commence the action against the vessel, Hull 308, would not have been granted, if the plaintiffs had applied for it at the date when they took out the writ.

[5] Doing what is right and fair in the circumstances, the discretion under s. 262(3) of the Act should not be exercised in favour of the plaintiffs. The plaintiffs immediately before the commencement of winding up of the defendants had no security over the vessel. If leave was granted to the plaintiffs, it would confer upon the plaintiffs a security on an asset of the defendants which the plaintiffs otherwise did not have and could not have. That would be unfair to the other unsecured creditors.

[Appeal dismissed with costs.]

Cases referred to:

In Re Aro [1980] Ch 196 ***(foll)***
In Re Redman (Builders) Ltd. [1964] 1 WLR 541 ***(cit)***
In Re St. Nazaire Company [1941] 12 Ch D 88 ***(cit)***
Lim Bock Lai t/a Hong Lam Marine Services Co. v. Selco (Singapore) Pte. Ltd. [1987] 2 MLJ 688 ***(foll)***
Preston Bank Company v. William Allsup & Sons [1895] 1 Ch 141 ***(cit)***
Re Exchange Securities & Commodities Ltd. & Ors. [1983] BCLC 186 ***(foll)***
Re V.G.M. Holdings, Ltd. [1941] 3 All ER 417 ***(cit)***
Re Oak Pits Colliery Co. [1882] 21 Ch D 322 ***(foll)***

Legislation referred to:

Administration of Justice Act 1956 [UK], ss. 1, 3(4)
Companies Act 1948 [UK], ss. 231, 325(1)(c)

Companies Act [Sing], ss. 255(2), 259, 260, 262(3), 334
High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 edn) [Sing], ss. 3, 4

For the appellants - C. Arul
For the respondents - Sarjit Singh Gill
For the interveners - Steven Chong (Lim Tean with him)

JUDGMENT

LP Thean J:

Between September 1984 and December 1985 the plaintiffs supplied certain equipment and engines to the defendants for the construction of, *inter alia*, a ship or vessel called "Hull 308". The construction was almost completed by December 1985 except for certain outstanding works to be carried out. On 3 December 1985, receivers and managers of the defendants were appointed on application by Standard Chartered Bank. On 17 February 1986, a petition for the winding up of the defendants was presented by one of its creditors, and on 18 February 1986 the receivers and managers were discharged by an order of Court, and on the same day provisional liquidators were appointed by the Court pending the winding up of the defendants. One month later, on 18 March 1986, the plaintiffs took out a writ of summons in Admiralty *in Rem* No. 155 of 1986 against the ship or vessel, "Hull No.308". No leave was obtained by the plaintiffs for commencing the action. However, on 18 April 1986, the plaintiffs applied by Summons-in-Chambers No. 3926 of 1986 (plaintiffs' application) for leave to serve the writ *in rem* on the vessel, "Hull No. 308", and to arrest her. About a month later, on 15 May 1986, the defendants took out an application, Summons-in-Chambers 5636 of 1986 (defendants' application), applying to set aside the writ *in rem*. The plaintiffs' application was heard 4 days later, on 19 May 1986, before Lai Kew Chai J who made an order giving leave to serve the writ on the vessel, Hull 308", and to arrest her. The writ was served and the vessel was arrested. Soon thereafter, Standard Chartered Bank applied for leave to intervene, and leave was given and the bank joined in these proceedings as the interveners. Subsequently, the defendants' application came on for hearing also before Lai Kew Chai J who then made an order setting aside the writ *in rem* taken out by the plaintiffs. Against that order, this appeal was brought, and at the conclusion of the hearing we dismissed it with costs. We now give our reasons.

There are two issues before us: one is procedural and the other is on the merits of the order. On the first issue, Counsel for the plaintiffs submitted that the learned Judge in hearing the plaintiffs' application on 19 May 1986 had exercised his discretion under s. 262(3) of the Companies Act (Cap. 50, 1985 Edn.) and made the order giving leave to the plaintiffs to serve the writ on the vessel, "Hull 308", and arrest her. In consequence, the learned Judge was *functus officio* in relation to that order and ought not to have entertained the defendants' application and by setting aside the writ the learned Judge was, in effect, rehearing the earlier application and varying the earlier order, which he was not entitled to do. The proper remedy open to the defendants was to appeal against the learned Judge's order made on the plaintiffs' application. In support, he referred to *In Re St. Nazaire Co.* [1941] 12 *Ch D* 88; *Preston Bank Co. v. William Allsup & Sons* [1895] 1 Ch 141, and *Re V.G.M. Holdings Ltd.* [1941] 3 All ER 417.

In response, Counsel for the defendants referred us to the arguments advanced before the learned Judge on the hearing of the plaintiffs' application and pointed out that the main issue before the learned Judge was whether "Hull 308" was a vessel, and that the parties did not address the question whether in the circumstances leave should be given for the

commencement of the action under s. 262(3) of the Companies Act. Hence, in allowing the plaintiffs' application the learned Judge had not been addressed on the question whether the writ *in rem* had been properly issued, and, if it was not, whether the plaintiffs were entitled to an order granting them leave to commence the action *nunc pro tunc*. Counsel for the interveners adopted the arguments of Counsel for the defendants and submitted further that even if the defendants had successfully appealed against the order made by the learned Judge on the plaintiffs' application, an order given on such appeal would still not provide the remedy sought by the defendants in their application, in that the writ *in rem* against the vessel would still be in force and the ship would continue to be encumbered. There would therefore have to be an application to set aside the writ, and that was the defendants' application.

The cases cited by Counsel for the plaintiffs are undoubted authorities for the rule that where a Judge has heard a matter and made an order, and that order has been passed and entered, provided that it accurately expresses the intention of the Court, neither the Judge nor another Judge of co-ordinate jurisdiction has the power to rehear the matter and vary the order. The basic question is whether the hearing of the defendants' application amounted to a rehearing of the plaintiffs' application and the order under appeal was a variation of the earlier order. The plaintiffs' application was for leave to serve the writ on the vessel and to arrest her; it was, in effect, an application for leave to proceed with the action and no doubt was made under s. 262(3) of the Companies Act, for leave would not be needed otherwise. It is clear to us that the arguments advanced before the learned Judge at the hearing were centred on the issue whether "Hull 308" was a vessel. No arguments were addressed on the question whether leave for the commencement of the action ought in the circumstances to be granted *nunc pro tunc* to the plaintiffs, and the learned Judge could not have intended to grant such leave to the plaintiffs at that time. As for the defendants' application, it came before the learned Judge later and was for an order that the writ *in rem* be set aside. The basis for such application was that leave to commence the action had not been obtained prior to the issue of the writ and the writ was therefore improperly issued and ought to be set aside, and that further such leave would not have been granted if an application there for had been made at the time the writ was issued. It was entirely a different application altogether and was not in any way affected by the outcome of the plaintiffs' application. Even if the defendants had successfully appealed against the order made on the plaintiffs' application, the result sought by the defendants in their application would still be unattainable. Their application to set aside the writ *in rem* would still be required, and unless and until the writ is set aside, the ship would remain encumbered. In our judgment, the hearing of the defendants' application did not amount to a rehearing of the plaintiffs' application and the order under appeal was not a variation of the order previously made on the plaintiffs' application. We therefore rejected the argument of Counsel for the plaintiffs.

We turn to the second issue which is on the merits of the order of the learned Judge setting aside the writ *in rem*. In his grounds of decision, the learned Judge, having referred briefly to the facts of the case, concluded thus:

> On these facts the company as defendants applied for an order that the writ of summons herein be set aside with costs. Standard Chartered Bank, as assignees of the building contract for the Hulls, being interested in the Hulls, obtained leave and intervened. The interveners supported the defendants' application. At the conclusion of the hearing of the application, I set aside the writ of summons with costs to the defendants and the interveners. I had said in my brief judgment that the claims of the plaintiffs, as necessariesmen, were not in the nature of a maritime lien. Since they had filed the writ after the commencement of the winding-up of the company which was wound up, it must inevitably follow that the writ of summons be

set aside. The reasons are, if I may say so, set out in my decision in *Lim Bock Lai t/a Hong Lam Marine Services Co. v. Selco (Singapore) Pte. Ltd.* [1987] 2 MLJ 688 which I incorporate into this judgment by reference. I did not think it was necessary to consider the question whether the Hulls were a "ship" for the purposes of invoking the admiralty jurisdiction of this Court.

The material facts in Admiralty Suit No. 162 of 1986 are similar to those in this action. On a similar application by the plaintiffs in that suit to set aside the writ of summons, I made similar orders.

In referring to *Lim Bock Lai* and adopting the reasoning given in that case, it is plain to us that the learned Judge dealt with the application on the basis that if the plaintiffs had applied at the time the writ was issued for leave to commence the action under s. 262(3) of the Companies Act, such leave would not have been granted. It is convenient at this stage to set out in full the provisions of s. 262(3) which is as follows:

(3) When a winding up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except:

(a) by leave of the Court; and

(b) in accordance with such terms as the Court imposes.

In *Lim Bock Lai v. Selco (Singapore) Pte. Ltd.* [1987] 2 MLJ 688, the plaintiffs supplied bunkers to three vessels which were then chartered to or in the possession or control of the defendants. As the defendants had failed to pay to the plaintiffs for the cost of bunkers, the latter took out three writs *in rem* against three vessels owned by the defendants respectively but did not serve the same or arrest the vessels. Subsequently, a creditor of the defendants presented a winding up petition against the defendants and a winding up order was made in due course, and by virtue of s. 255(2) of the Companies Act the winding up of the defendants was deemed to have commenced on the date of the presentation of the winding up petition. The plaintiffs applied under s. 262(3) of the Companies Act for leave to proceed with the admiralty proceedings which they had instituted. The application was heard before Lai Kew Chai J. He held that the issue of a writ *in rem* in exercise of the statutory right of action "has crucial consequences which enure to the benefit" of the plaintiffs. As a result, the plaintiffs were in that sense a "secured creditor" and that fact was "also a substantial consideration" in the exercise of his discretion and accordingly in exercise of his discretion he granted leave to the plaintiffs to continue the actions *in rem*. In coming to this conclusion the learned Judge followed the decision of the Court of Appeal in England in *In re Aro* [1980] Ch 196.

We now turn to *In re Aro*. In that case, a Liberian shipping company owned a vessel called "Aro", which had been laid up in Blackwater River for lack of employment. The company had no place of business in the United Kingdom and its only asset was the vessel "Aro". The vessel's value was US$300,000 for scrap. The company was indebted to various creditors, one of whom was Shell Co. (Hellas) Ltd. (Shell) which had a claim for bunkers supplied to "Aro". In May 1977 Shell issued a writ *in rem* against the vessel and arrested her. On 22 July 1977 the plaintiffs took out a writ *in rem* also against the vessel claiming for short delivery of cargo and breach of a contract of carriage. The writ was not served; nor was the vessel arrested. As the vessel was already under arrest by Shell, a second arrest was not necessary and the plaintiff merely entered a caveat in Admiralty Register on the same day as the writ was issued. On 29 November 1977 a petition was presented by a mutual underwriting association for the winding up of the company and a winding up order was made two months later. The plaintiffs subsequently applied for leave pursuant to s. 231 of

the Companies Act 1948 (which is in *pari materia* with s. 262(3) of our Companies Act) to continue the action against the vessel and the shipping company. Oliver J refused leave holding that the plaintiffs not having served the writ had not invoked the jurisdiction of the Admiralty Court and perfected the security and was thus not a secured creditor, and accordingly should not achieve priority over other unsecured creditors by being granted leave to proceed with the action. The Court of Appeal, however, reversed his decision.

The judgment of the Court was delivered by Brightman LJ. He held that the plaintiffs brought this action *in rem* against the ship under ss. 1 and 3 of the Administration of Justice Act 1956 (which are in *pari materia* with ss. 3 and 4 of our High Court (Admiralty Jurisdiction) Act (Cap. 123, 1985 Edn.)) and their claim gave rise to a statutory lien, "more accurately described as a statutory right of action *in rem*". Upon the issue of the writ the plaintiffs became entitled to the arrest and detention of the ship pending adjudication, and upon adjudication in their favour to a sale and satisfaction of their judgment out of the proceeds of the sale, subject to other claims ranking in priority to or *pari passu* with their claim. The plaintiffs' right of suing *in rem* had points of similarity with those of a legal or equitable mortgagee or chargee. He said, at pp. 207-208:

> The usual object of suing *in rem* is to obtain security. The plaintiff becomes entitled upon the institution of his suit to the arrest and detention of the subject matter in the custody of an officer of the Court pending adjudication, and on adjudication in his favour to a sale and satisfaction of his judgment out of the net proceeds thereof, subject to other claims ranking in priority to or *pari passu* with his own. So stated, the rights of a plaintiff suing *in rem* have points of similarity with the rights of a legal or equitable mortgagee or chargee; such persons are also entitled in appropriate circumstances to have the subject matter of the charge preserved for their benefit, and if the account is in their favour to have it sold in order to satisfy the debt. The similarity is carried a stage further by the decision in *The Monica S.* [1968] p. 741, where it was held that the burden of the statutory right of action *in rem* in a case under s. 3(4) of the Administration of Justice Act 1956 ran with the ship so as to enable the plaintiff to serve the writ on the ship notwithstanding a transfer of ownership since the writ was issued. It must follow from that decision that the plaintiff *in rem* is entitled to have the ship arrested despite change in ownership, and notwithstanding that the writ has not been served. The case is of critical importance to our decision because, applied to the instant case, it means that, had the liquidator sold the ship, he could only have sold subject to the plaintiffs' claim; this does not seem far removed from saying that the liquidator could only sell a proprietary interest equivalent to a right to redeem.

He went on to hold that the proper test for determining the position of the plaintiffs as a secured creditor was whether immediately before the presentation of the winding up petition they could assert against all the world that the vessel "Aro" was security for their claim. After the issue of the writ the plaintiffs could serve the writ on Aro and arrest her and Aro was effectively encumbered with the plaintiffs' claim. Therefore, the plaintiffs ought to be considered as secured creditors for the purpose of deciding whether or not the discretion of the Court should be exercised in their favour under s. 231. He said, at p. 209:

> In our judgment there is no particular reason for equating the date of the creation of the status of a secured creditor with the date of when the Admiralty jurisdiction can be said to be "invoked" for the purposes of s. 3 of the Administration of Justice Act 1956. It seems more logical to test the position of the plaintiffs by asking whether, immediately before the presentation of the winding up petition, they could properly assert as against all the world that the vessel Aro was security for their claim, not whether they could assert that they had invoked the jurisdiction of the Admiralty Court within the meaning of s. 3 of the Act of 1956. If it is correct to say, as was not challenged in the Court below and is not challenged in this Court, that after the issue of the writ *in rem* the plaintiffs could serve the writ on the

Aro, and arrest the *Aro*, in the hands of a transferee from the liquidator and all subsequent transferees, it seems to us difficult to argue that the *Aro* was not effectively encumbered with the plaintiffs' claim. In our judgment the plaintiffs ought to be considered as secured creditors for the purpose of deciding whether or not the discretion of the Court should be exercised in their favour under s. 231.

Brightman LJ also adopted an alternative approach and held that the "dispensing power" in s. 231 was not in terms dependent on the plaintiffs' establishing the status of a secured creditor but on the exercise of the Court's discretion conferred expressly by that section. That section gives the Court the discretion to do what is right and fair in the circumstances. He said, at p. 209:

There is an alternative approach. The dispensing power in s. 231 is not in terms dependent on the plaintiffs' establishing the status of secured creditors, but on the exercise of the Court's discretion. The discretion is conferred by the words "except by leave of the Court and subject to such terms as the Court may impose." In s. 325(1)(c) the discretion exercisable by the Court in favour of the execution creditor is conferred by the words "the rights conferred by this subsection on the liquidator may be set aside by the Court in favour of the creditor to such extent and subject to such terms as the Court may think fit". The nature of this latter discretion has been considered in three recent cases. In *In re Grosvenor Metal Co. Ltd.* [1950] Ch 63, 65, Vaisey J said:

The section seems to give the Court a free hand to do what is right and fair according to the circumstances of each case. In *In re Suidair International Airways Ltd.* [1951] Ch 165, Wynn-Parry J adopted the same construction of the subsection, as also did Pennycuick J in *In re Redman (Builders) Ltd.* [1964] 1 WLR 541. We consider that those cases were correctly decided. The only appreciable difference between the wording of the two sections is that s. 325 includes the words "to such extent" as well as the words "subject to such terms". This appears to us a trivial distinction on which to found a decision that the discretion under s. 231 is somehow narrower than the discretion under s. 325. We adopt the definition of the discretion under s. 325 as applied in the three cases mentioned and we consider that the discretion of the Court under s. 231 gives the Court an equal freedom to do what is right and fair in the circumstances.

In conclusion, Brightman LJ held that there was no virtue in confining relief under s. 231 to a claimant who had served the writ on the ship, as service would add nothing to the claimant *vis-a-vis* the vessel sued. Hence he held that leave under s. 231 ought to be granted to the plaintiffs even if it was incorrect to regard them as having been secured creditors at the commencement of the winding up.

In both these cases, namely, *Lim Bock Lai* and *In re Aro*, the plaintiffs took out the writ *in rem* against the ships before the commencement of winding up of the respective owners thereof, and the plaintiffs could at that point of time "properly assert against all the world" that the ships in question were a security for their claims respectively. In the instant case, the plaintiffs took out the writ *in rem* against the vessel, "Hull 308", after the commencement of the winding up of the defendants. They could not immediately before the commencement of the winding up assert in any way that they had any security on the vessel; they did not satisfy the test laid down by Brightman LJ. They could not therefore be considered as a secured creditor for the purpose of deciding whether or not the discretion under s. 262(3) of the Companies Act should be exercised in their favour. In our opinion, on the authorities of *Lim Bock Lai* and *In re Aro*, leave to commence the action against the vessel, Hull 308, would not have been granted, if the plaintiffs had applied for it at the date when they took out the writ.

Following the alternative broad approach adopted by Brightman LJ and doing what is right and fair in the circumstances we do not think that in this case the discretion under s. 262(3) of the Act should be exercised in favour of the plaintiffs. The plaintiffs immediately before the commencement of winding up of the defendants had no security over the vessel, and should leave in such circumstances be granted, it would confer upon the plaintiffs a security on an asset of the defendants which the plaintiffs otherwise did not have and could not have. That would be unfair to the other unsecured creditors. The primary object of the winding up provisions of the Companies Act, as held by Lindley LJ in *Re Oak Pits Colliery Co.* [1882] 21 Ch D 322 at p. 329, is to put all unsecured creditors upon an equality and to pay them *pari passu* or in the words of Brightman LJ in *In re Aro* at p. 203:

> The basic scheme of the companies legislation is that the unsecured creditors of an insolvent company are to rank *pari passu* (subject to statutory provisions as to preferential payments).

For instance, under s. 259 of the Companies Act any disposition of the property including things in action made after the commencement of the winding up by Court is void unless the Court otherwise orders. Similarly, s. 260 avoids any attachment, sequestration, distress or execution against the estate or effects of the company put in force after the commencement of the winding up by the Court, and s. 334 contains provisions restricting rights of creditors in respect of execution or attachment proceedings against the company not completed before the date of commencement of winding up.

Counsel for the interveners very helpfully referred us to the case of *Re Exchange Securities & Commodities Ltd. & Ors.* [1983] BCLC 186. In that case, there were ten applications, all by the same nine applicants, relating to ten companies in liquidation. The applicants in respect of each of the companies applied for leave under s. 231 of the Companies Act 1948 to commence action against that company. The applicants were all investors in the companies and sought leave to sue the companies with a view to establishing the existence of trust interests on the ground that they were not creditors but beneficiaries under trusts. All the applications were refused by Mervyn Davies J. The learned Judge after reviewing the claims and the authorities concluded thus, at pp. 195-196:

> I must now decide the question put to me. I have tried to take account of all considerations urged upon me on both sides. My decision is that the companies are not to be at liberty to commence the proposed proceeding. My reason for this is that I must do what is right and fair in the circumstances: see the *Aro* case [1980] Ch 196 at p. 209. It seems right and fair to me, in the circumstances of this case, not to allow the action. The approach should be, I think, that leave should be refused under s. 231 if the action proposed raises issues which can be conveniently decided in the course of the winding up. It seems plain to me that the issues which would be discussed in the proposed chancery action can perfectly well be decided in the ordinary course of the liquidation. Now that the liquidator is aware of the trust claims and moreover, has by his Counsel undertaken to put before the Court in a neutral fashion the issue whether or not the various classes of investors have trust interests, it seems to me quite unnecessary to allow a separate action to decide these issues. I add that there seems to me to be positive benefit in having the issues decided in the liquidation because the procedure should be quicker and less expensive than writ or originating summons proceedings.
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> The general approach I have mentioned gives way in special circumstances: see, for example, the *Redman* case and compare the *Aro* case. I see no special circumstances here. The considerations urged on the plaintiffs' behalf do not, singly, or taken together, seem to me to make it right or fair to allow the action.

For the reasons we have given, this appeal must fail, and we dismissed it with costs.

Also found at [1991] 3 CLJ 2984